

TAX NEWSLETTER

December 2015, Issue 10

ACA UPDATE: NEW CHALLENGES FOR 2016

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Introduction

We all survived the rollout of the Affordable Care Act’s individual provisions in the last tax season. As the National Taxpayer Advocate recognized in her [2016 Fiscal Year Objectives Report to Congress](#), the 2015 tax season was largely successful. There were certainly bumps along the road, and it was a difficult tax season for a small minority of taxpayers, but the majority of taxpayers were unaffected by the new Affordable Care Act (ACA) provisions. It was also a relatively normal tax season for many Low Income Taxpayer Clinics (LITCs). LITCs are just starting to get into the examination, assessment and collection issues related to the 2014 Premium Tax Credit (PTC).

Taxpayers and practitioners will confront new challenges in 2016. Taxpayers who failed to reconcile their 2014 advance payments of the Premium Tax Credit (APTC) will not be eligible for APTC in 2016. New information returns will be filed for 2015, as the Internal Revenue Service continues to phase in the implementation of the shared responsibility provisions. As that implementation continues, LITCs will begin to see examination, assessment, and collection issues related to the individual shared responsibility payment. Finally, IRS enforcement of the employer shared responsibility provision could tempt some employers to retaliate against employees who claim a PTC, and employees may seek advice about the possible consequences of causing their employer to be liable for an employer shared responsibility payment (ESRP).

APTC Reconciliation Issues

It’s open enrollment time again on the Health Insurance Marketplace. This is the third open enrollment period in which individuals can sign up for private health insurance plans and apply for subsidies to help pay for those plans. Open enrollment for the 2016 plan year runs from November

1, 2015, through January 31, 2016. *See*, [Dates & Deadlines for 2016 Health Insurance](#) on healthcare.gov.

Health Insurance Marketplaces are also known as health benefit exchanges. The U.S. Code, federal regulations, and formal guidance documents use the term “exchange,” so that is the term I will use in this article. The federal government uses the term “Marketplace” on websites and in publications for taxpayers. The terms are synonymous.

For the first time in the exchanges’ short history, individuals can be denied APTC for a new plan year on the basis of a failure to reconcile prior-year APTC. Reconciliation of prior-year APTC is a condition of APTC eligibility, 45 C.F.R. § 155.305(f)(4), but because tax returns are filed months after open enrollment, it takes nearly a full calendar year for the system to catch a failure to reconcile. Exchanges are currently making eligibility determinations for 2016 APTC. Taxpayers who received APTC in 2014 must have reconciled those payments in order to be found eligible for 2016.

What is reconciliation, and what is not?

One frequent question among health care assisters has been, “what does it mean to reconcile APTC”? 2016 open enrollment may bring to light some misconceptions regarding reconciliation. Reconciliation means that an income tax return was filed that included Form 8962, Premium Tax Credit. *See*, I.R.M. 21.6.3.4.2.16, Premium Tax Credit (10-01-2015); 45 C.F.R. § 155.305(f)(4). A pending examination of the PTC does not prevent a taxpayer from receiving APTC for 2016, as long as Form 8962 was filed with the return. However, the filing of an income tax return without Form 8962 will prevent a taxpayer from receiving APTC for 2016, unless IRS has taken action to correct the omission, for example through an examination.

Taxpayers do not have to have paid back any excess 2014 APTC in order to receive APTC for 2016. *See*, I.R.M. 21.6.3.4.2.16, Premium Tax Credit (10-01-2015); 45 C.F.R. § 155.305(f)(4). This makes practical sense because excess APTC is treated as additional income tax liability. I.R.C. § 36B(f)(2)(A). Its collection is not tracked separately by the IRS.

LITCs may soon begin to see situations in which IRS has assessed an erroneous liability related to APTC, including PTC audit reconsideration cases. Taxpayers should be reassured that controversies over the correct liability will not affect ongoing eligibility for APTC. If IRS has assessed tax liability based on a taxpayer’s 2014 APTC, that is sufficient reconciliation for 2016 APTC purposes, whether or not the liability is correct.

In some situations, exchanges may have data indicating that the taxpayer failed to reconcile when in fact that is not the case. This could happen if the taxpayer filed a return late in the year, especially if it was a paper return. Because the government recognizes that exchange data will lag behind reality, exchanges will accept an attestation that the applicant reconciled APTC. *See*, CMS Assister Newsletter, Oct. 14, 2015, section IV (on file with author). This is consistent with the general application processing regulations that require exchanges to provide subsidies based on an applicant’s attestation, pending resolution of an inconsistency. *See*, 45 C.F.R. § 155.315(f)(4). A

question regarding APTC reconciliation has been added to the HealthCare.gov application forms. See, [Application Forms for Individuals and Families](#) at [marketplace.cms.gov](#).

Some taxpayers may believe that they reconciled APTC when in fact they failed to file Form 8962, Premium Tax Credit. The IRS attempted to catch these cases on the front end by holding up the processing of tax returns which it identified as lacking a required Form 8962. Taxpayers whose returns were held up received Letter 12C, *Individual Return Incomplete for Processing*, requesting Forms 8962 and 1095-A. See, I.R.M. 21.6.3.4.2.16.3 At-Filing Overview (10-01-2015). The IRS also sent out letters last July (Letters [5591](#), [5591A](#), and [5596](#)), delivering a warning to taxpayers who had failed to reconcile by that point.

Taxpayers who responded to a Letter 12C with a completed Form 8962 generally had their accounts adjusted. In some situations those taxpayers may have been told to file an amended return, in which case that would need to be filed before the taxpayer could receive APTC for 2016. See, I.R.M. 21.6.3.4.2.16.5, Premium Tax Credit Math Error Notice Responses (10-01-2015), paragraphs 4 and 6. Also, some taxpayers may have responded in ways that were not sufficient for IRS to reconcile APTC on their accounts, and mistakenly believed their response was sufficient. These taxpayers may learn during the 2016 enrollment process that their 2014 APTC has not actually been reconciled according to IRS records. It will be important for these taxpayers to take corrective action before open enrollment ends.

Reconciliation deadlines

The deadline to attest to reconciliation to receive APTC for January is December 15, 2015. This is the deadline to pick a January plan. See, 45 C.F.R. § 155.410(f)(2); see also, [Dates & Deadlines for 2016 Health Insurance](#) on [healthcare.gov](#); FFM and FF-SHOP [Enrollment Manual](#) p. 13 (Oct. 1, 2015). So far, exchanges have indicated they will not extend this deadline, and no APTC will be paid for January if the attestation is made after that date. This is consistent with the regulations; exchange effective dates are almost always forward-looking. See, 45 C.F.R. §§ 155.310(f); 155.330(f). December 15 should be the deadline that practitioners emphasize to taxpayers who still need to reconcile 2014 APTC.

The exchange effective dates and the past-year reconciliation requirement only affect APTC eligibility. A taxpayer who qualifies under Section 36B may still receive a PTC for January (and other months in 2016) on his tax return. Section 36B does not include a prior-year reconciliation requirement.

What happens if a taxpayer misses the December 15 deadline? I will walk through the consequences for a fictional taxpayer, David. If David has not been auto-enrolled in a 2016 plan, he has until January 31 to apply for 2016 coverage. He should not apply for coverage until he can attest to reconciliation. This scenario will mostly apply to people without a 2015 Qualified Health Plan (QHP), as most taxpayers with a 2015 plan will be auto-enrolled for 2016. See, CCIIO [Bulletin 16: Guidance for Issuers on 2016 Reenrollment in the Federally-facilitated Marketplace \(FFM\)](#), Aug. 25, 2015, *available at* [cms.gov/ccio](#).

If David was auto-enrolled in a QHP for 2016, but the exchange data indicates that he did not reconcile 2014 APTC, he will receive a bill for his unsubsidized January premium. If David misses the December 15 deadline to attest to reconciliation, there are two main possible outcomes regarding David's health insurance coverage and whether he can get APTC to help pay the premium.

Scenario 1: David pays the full January bill by the deadline.

In scenario 1, David has effectuated his 2016 QHP enrollment by making the first payment. *See*, 45 C.F.R. § 155.400(e). David can contact the exchange at any time to make a reconciliation attestation and request an APTC determination. Exchanges are required to redetermine eligibility for subsidies upon receipt of new information. 45 C.F.R. § 155.330(a). They are also required to process new applications at any time. 45 C.F.R. § 155.310(c).

If the exchange subsequently finds David eligible for subsidies, the effective date of the change (when David's premium decreases) depends on when he contacted the exchange. David may need to pay full price for February and possibly later months as well, depending on when he attests to reconciliation. *See*, 45 C.F.R. § 155.330(f). For February APTC, the change must be reported by January 15. For March APTC, it must be reported by February 15, and so on. *Id.* State-based exchanges have some flexibility to set a later cutoff date. *See*, 45 C.F.R. § 155.330(f)(2).

Although David missed the deadline to get APTC for January 2016, he can still receive a PTC for January on his tax return. David has enrolled in qualifying health coverage and paid the premium. If he meets the other eligibility criteria he could receive a PTC at the end of the year.

Scenario 2: David does not pay his premium bill for January.

In this scenario, David's 2016 QHP enrollment will be cancelled, because he did not pay his bill by the deadline. Health insurance issuers and exchanges have some flexibility to set the deadline. *See*, FFM and FF-SHOP [Enrollment Manual](#) pp. 18 – 19 (Oct. 1, 2014). However, there is no grace period permitted at the beginning of a plan year. *See*, FFM and FF-SHOP [Enrollment Manual](#) p. 19 (Oct. 1, 2015); 45 C.F.R. § 155.400(e). David can still apply for 2016 coverage during the open enrollment period and attest to reconciliation during the application process. The last day of open enrollment is January 31, 2016. David will have a gap in health insurance coverage for at least January and perhaps also February. *See*, Exhibit 4, Coverage Effective Dates for the 2016 FFMs OEP, FFM and FF-SHOP [Enrollment Manual](#) p. 13 (Oct. 1, 2015).

One potentially tricky aspect of this scenario is that David might have to wait until his 2016 auto-enrollment is cancelled before he can reapply. This will depend on the exchange processes. David needs to have his auto-enrollment cancelled in order to avoid owing the unsubsidized premium for January. The worst outcome for David would be for the exchange to process a Change of Circumstance rather than a new enrollment.

If an exchange processed a new application as a change of circumstance because David's auto-enrollment had not yet been cancelled, then he would still owe the full unsubsidized premium for January. As discussed above, APTCs are not granted retroactively. Unless the situation were corrected, David's 2016 insurance would eventually be terminated if he could not pay the unsubsidized premiums for the months before APTC became effective.

If QHP coverage is terminated outside of open enrollment, a taxpayer cannot reenroll in 2016 coverage without qualifying for a special enrollment period. 45 C.F.R. § 155.410(a)(2).

If a taxpayer realizes that he or she did not file Form 8962, the fastest way to fix it may be to file an amended tax return. For exchange application purposes, this could be much faster than going through the examination which should be pending if 2014 APTC was not reconciled. (If the taxpayer did not need 2016 APTC, I might be inclined to resolve it through the examination instead.) As soon as the amended return is in the mail, the taxpayer can call the exchange and attest to reconciliation in order to get APTC. It will be important to keep the exchange effective dates in mind when advising assisters and taxpayers about this, particularly leading up to the 15th of each month.

For most taxpayers who qualify for a PTC, exchange health plans are not affordable without subsidies. The lack of a grace period at the beginning of a plan year actually helps those taxpayers, because they have until January 31 to reconcile and reapply for coverage. Assisters and practitioners must keep in mind the prospective nature of APTC eligibility decisions, and take pains to help taxpayers avoid getting trapped by a bill for unsubsidized January coverage. As mentioned above, the deadline emphasized to taxpayers should be December 15 to avoid a gap in coverage and to avoid confusion regarding an auto-enrollment that needs to be cancelled.

2015 Information Returns

For tax year 2015, two new information returns will help the Service further implement both the Premium Tax Credit and the individual shared responsibility provision. Individuals who were enrolled in government-sponsored or private insurance coverage that is MEC will receive [Form 1095-B](#) from a government agency or health insurance company. *See generally*, I.R.C. § 6055; T.D. 9660, 79 Fed. Reg. 13220 (March 10, 2014); [Information Reporting by Providers of Minimum Essential Coverage](#) on irs.gov. In addition, individuals may receive Form [1095-C](#) from a large employer. *See generally*, I.R.C. § 6056; T.D. 9661, 79 Fed. Reg. 13,231 (March 10, 2014); [Information Reporting by Applicable Large Employers](#) on irs.gov.

Form 1095-B is filed by government agencies sponsoring MEC, by private health insurance companies sponsoring MEC (including SHOP coverage but not individual QHPs), and by non-ALE employers who provide self-insured coverage. A substitute form may be used. Treas. Reg. § 1.6055-1(f)(2)(iii).

Form 1095-C is filed only by Applicable Large Employers (ALEs). An ALE for 2015 is generally an employer who averaged 50 or more full-time employees and full-time equivalent employees in 2014.

See, I.R.C. § 4980H(c)(2) and Treas. Reg. § 54.4980H-1(a)(4). ALEs must file Form 1095-C to report any offer of health insurance coverage made to a full-time employee, or to report that no offer was made. There are several different codes that ALEs will use to indicate the type of health insurance that was offered, and other codes that identify the status of the employee in each month of the year. *See*, [Instructions to Forms 1094-C and 1095-C](#). In addition, ALEs can use codes on Form 1095-C and 1094-C to claim transition relief, safe harbors, and other relief for situations in which the ALE is not subject to an ESRP for the employee. *Id.* ALEs who provide self-insured coverage must complete Part III of Form 1095-C in lieu of filing Form 1095-B as a health insurance issuer. *See*, Treas. Reg. § 1.6055-1(f)(2)(i).

Form 1095-C's primary function is to enforce the employer shared responsibility provision. Because of this focus, the form will not always give an individual recipient all the information the recipient needs to determine his or her individual shared responsibility obligation or PTC eligibility. In addition, in certain situations the ALE may furnish a simplified statement to the employee, rather than provide a copy of Form 1095-C. *See*, Treas. Reg. § 301.6056-1(j)(1) (qualifying offer certification); 79 Fed. Reg. 13,241 (qualifying offer transition relief for 2015). The simplified statement provides even less information, and in some situations may be misleading or incorrect. This is discussed further below.

Both of the new forms are relevant to individuals who wish to claim a PTC. Either form could show that the recipient was eligible for MEC other than individual market coverage, thus disqualifying the recipient from the PTC. *See*, I.R.C. § 36B(c)(2). The new forms will also help the Service enforce both the individual and the employer shared responsibility provisions by documenting MEC coverage and ALE offers of coverage.

If Form 1095-B shows that an individual had coverage, the individual is probably not eligible for a PTC for that month. I.R.C. § 36B(c)(2). The main exception to this rule is for retroactively-granted Medicaid. *See*, Treas. Reg. § 1.36B-2(c)(2)(iv). Unfortunately, retroactively-granted Medicaid will be reported on the form the same way as prospectively-granted Medicaid. *See*, Form [1095-B instructions](#), example 2, p. 5. If the conflicting coverage is Medicaid, practitioners should investigate whether the taxpayer received retroactive coverage.

For 2015, duplicate coverage requiring repayment of APTC could be a significant problem. A recent U.S. Government Accountability Office report found that some individuals had overlapping APTC and Medicaid, and that government policies and procedures did not adequately prevent this from happening. [GAO-16-73](#), Oct. 9, 2015. Duplicate coverage was not necessarily the beneficiary's fault. To date the Service has not issued any systemic abatement policy regarding APTC repayment for individuals who unknowingly or unwillingly received APTC at the same time as other coverage.

As mentioned above, there are circumstances in which a large employer does not have to furnish Form 1095-C to its full-time employees. In those situations the employee may receive a simplified statement or a letter in place of Form 1095-C. *See*, Treas. Reg. § 301.6056-1(j)(1) (qualifying offer certification); 79 Fed. Reg. 13,241 (qualifying offer transition relief for 2015). A qualifying offer is an

offer of MEC extended to a full-time employee and his or her spouse and dependents, which provides minimum value and has a premium for employee-only coverage not exceeding 9.5% of the U.S. mainland federal poverty line. *See*, Treas. Reg. § 301.6056-1(j)(1)(i). This is a slight simplification; for the complete slew of “ifs, ands, and buts” I refer the reader to the regulation.

If a qualifying offer was made for all 12 months of the year, the employee’s simplified statement will say that he or she (and his or her family) is not eligible for a PTC. *See*, Form [1095-C instructions](#), p. 7; 79 Fed. Reg. 13,241. However, the employer does not actually have all the information needed to determine this. The statement will be true in most cases, but not all. It might not be true if the employee, spouse, or dependent’s immigration status does not qualify him or her for Medicaid. In that situation, the taxpayer may qualify for a PTC despite having income under 100% of the federal poverty line. I.R.C. § 36B(c)(1)(B). The regulations’ preamble recognizes that a qualifying offer renders an employee and his or her family “generally ineligible” for the PTC, (79 Fed. Reg. at [13,241](#)) but the qualifying term is omitted from the Form [1095-C instructions](#) (see p. 7). This is worrisome, since tax preparers may not expect the substitute statement prescribed by the IRS instructions to be incorrect in some cases.

The ACA information reporting regulations are complicated and their completion for 2015 may be a struggle for some filers. For the 2015 tax year, the Service announced penalty relief for entities who file incomplete or incorrect Forms 1095-B or 1095-C. *See*, 79 Fed. Reg. at [13,226](#) (Mar. 10, 2014) (Section 6055 returns); 79 Fed. Reg. at [13,246](#) (Mar. 10, 2014) (Section 6056 returns). The returns must be timely filed and the filer must make a good faith effort to comply with the requirements of Sections 6055 and 6056. *Id.* Hopefully, large employers and MEC providers will do their best to report correct information and provide corrected forms when errors are brought to their attention. Penalties could be imposed for incorrect information returns if the issuer refuses to correct an error that is brought to its attention, as that would not indicate a good faith effort to comply with the information reporting requirements. *See, Id.; see also* Treas. Reg. §§ 1.6055-1(h); 301.6056-1(i).

Recipients of false information returns can sometimes sue for civil damages under Section 7434. However, that provision only applies to the nine information returns listed in I.R.C. § 6724(d)(1)(A). *See*, I.R.C. 7434(f). The information returns required by sections 6055, 6056, and 36B are not on the list.

Section 1411 Certifications

Employer liability for a shared responsibility payment is contingent upon receipt of a “Section 1411 Certification” relating to a full-time employee. *See*, I.R.C. §§ 4980H(a)(2), 4980H(b)(1)(B). The Section 1411 Certification notifies an employer that an employee received a subsidy through Section 36B or through an exchange. Subsidies include both PTCs and cost-sharing reductions (CSRs). *Id.* The statute places responsibility for the certifications on the Secretary of the U.S. Department of Health and Human Services (HHS) and the exchanges. *See*, Patient Protection and Affordable Care Act (ACA) § 1411(e)(4)(B)(iii), P.L. 111-148 (*codified at* 42 U.S.C. 18081(e)(4)(B)(iii)). However, the exchange regulations provide that a “notice” will be sent by an exchange following an initial subsidy

determination, and the official Section 1411 Certifications will be sent by the IRS. *See*, 45 C.F.R. § 155.310(h) & (i). Presumably, the IRS certifications will be sent following final determinations of PTC eligibility for a tax year.

Exchanges will eventually begin sending notices to the employer of any employee who is granted APTC or cost-sharing subsidies. *See*, 45 C.F.R. § 155.310(h). These notices will advise the employer of their right to appeal the subsidy decision through the exchange. *Id.* The employer notice and appeal provisions have not yet been implemented, to my knowledge, by any exchange. The federal exchange intends to send employer notices beginning in 2016. *See*, CCIIO, [Frequently Asked Questions Regarding The Federally-Facilitated Marketplace's \(FFM\) 2016 Employer Notice Program](#) (September 18, 2015), *available at* cms.gov/ccio. However, HHS recently proposed amendments to the rules governing employer notice, so it is possible that implementation will be postponed again. *See*, [Notice of Proposed Rulemaking](#), Patient Protection and Affordable Care Act: Benefit and Payment Parameters for 2017 (publication scheduled for Dec. 2, 2015).

In addition to the exchange's employer notice program, the Service will adopt procedures to certify to an employer that an employee received a PTC or CSR. *See*, 45 C.F.R. § 155.310(i); *see also* discussion at 79 Fed. Reg. [8566](#). The IRS has not yet issued any sub-regulatory guidance or procedures for Section 1411 Certifications.

Section 1411 is not a model of clarity. *See*, ACA § 1411(e)(4)(B)(iii) (*codified at* 42 U.S.C. 18081(e)(4)(B)(iii)). Under the statute and current regulations, payment of a CSR can be sufficient to trigger an ESRP. Under 45 C.F.R. § 155.555(l), the outcome of an employer appeal can affect the employee's eligibility for subsidies going forward. It is therefore somewhat puzzling that the federal government appears to be advising employers that the outcome of an exchange appeal will make no difference as to whether an ESRP will be owed. *See*, CCIIO, [Frequently Asked Questions Regarding The Federally-Facilitated Marketplace's \(FFM\) 2016 Employer Notice Program](#) p. 1 (September 18, 2015), *available at* cms.gov/ccio ("The IRS will independently determine any liability for the employer shared responsibility payment without regard to whether the Marketplace issued a notice or the employer engaged in any appeals process."); [Decisions Employers Can Appeal](#), at healthcare.gov ("IMPORTANT: This appeal will NOT determine if an employer has to pay the fee.").

On the other hand, it makes more sense to determine ESRP liability after tax returns and information returns have been filed for the year. Exchange appeals are not an exclusive remedy; additional appeals can be provided under subtitle F of the Code (Procedure and Administration). *See*, ACA § 1411(f)(2)(A) (*codified at* 42 U.S.C. 18081(f)(2)(A)). If employers could be held harmless for failing to appeal through an exchange, this would be preferable. Exchange appeals by employers could be frustrating and futile exercises on both sides. Exchange notices will be sent to all employers whose employees are granted subsidies, even those who are not in danger of owing an ESRP. Some employers may panic at an exchange notice and file an appeal, when in fact that employee's receipt of a PTC does not subject them to an ESRP. An exchange will not know whether an employer is an ALE, or whether the employee is considered a full-time employee under Section 4980H. The

exchange will not know whether the employer uses an affordability safe harbor or qualifies for Section 4980H transition relief.

It will be interesting to see whether any employer shared responsibility payments are assessed based on the receipt of CSR where the employee is ultimately determined ineligible for a PTC under Section 36B. There is no reconciliation for cost-sharing reductions, so the government has no opportunity to recoup erroneous CSR payments absent taxpayer misrepresentation or fraud.

ACA Section 1411 provides very limited exceptions to the strict confidentiality of tax information established by Section 6103. Employers may be frustrated with any appeal process because the employee's tax return information cannot be disclosed, so the employer will not be able to fully understand or challenge the employee's receipt of a subsidy. The exchange may release the employee's name and whether the employee's income is above or below the affordability threshold; nothing more is permitted without an employee waiver. *See*, ACA § 1411(f)(2)(B) (*codified at* 42 U.S.C. 18081(f)(2)(B)).

The Section 1411 Certification is of very high importance. The development of procedures around the Certification will be an important area to watch as implementation of the ACA continues in 2016. As employers start to be notified that workers have received a subsidy, education and training on the ACA's protections for both employers and employees will be needed.

Worker Classification and ACA Protections from Employer Retaliation

Under Section 4980H, an employee's receipt of a health insurance subsidy could cost their employer a substantial sum of money. Employees may be worried about getting their employers in trouble by applying for health insurance subsidies. Also, the ESRP provides another incentive for employers to misclassify employees as independent contractors.

[Section 1558](#) of the ACA protects employees from retaliation for receiving a PTC, CSR, or for engaging in whistleblower conduct regarding any violation of Title I of the ACA. Title I of the ACA includes a variety of insurance market reforms, such as the prohibition against preexisting condition exclusions. This statute only protects employees. When advising taxpayers, LITCs should keep in mind the potential for misclassification and consider whether a misclassified taxpayer could be protected under Section 1558.

The Occupational Safety and Health Administration (OSHA) is tasked with enforcing ACA Section 1558. Interim final regulations were published in the Federal Register in 2013. [78 Fed. Reg. 13,222](#) (Feb. 27, 2013). OSHA has also published a short [fact sheet](#) summarizing the law and the complaint process.

If an employee believes his or her employer has violated Section 1558, the employee must file a written complaint with OSHA within 180 days of the retaliation. OSHA investigates complaints and may order a wide range of relief, including reinstatement, back pay, monetary damages, and legal fees.

It is possible to file a [complaint online](#). The current complaint form does not include a checkbox for receipt of a PTC. Employees alleging retaliation on that basis would need to check “other” in response to question 25 on the complaint form.

A second whistleblower provision is located in the Code and predates the ACA. Section 7623 provides for whistleblower informant awards to individuals whose disclosures result in the assessment and collection of tax. An [informant award](#) can be between 15 and 30% of the amount collected, depending on several factors. The worker classification of the applicant does not affect eligibility.

It is possible that a worker who blows the whistle on misclassification of employees could seek an informant award under Section 7623 based on the subsequent collection of an ESRP. As discussed at several recent American Bar Association Tax Section meetings, relief from employment tax liability under Section 530 of the Revenue Act of 1978 (P.L. 95-600) does not affect a worker’s status under Section 4980H and does not affect any potential ESRP. *See*, discussion in preamble to final rule, Shared Responsibility for Employers Regarding Health Coverage, at [79 Fed. Reg. 8,567-8,568](#) (Feb. 12, 2014). Reclassification of workers for Section 4980H purposes could result in a substantial ESRP.

LITCs should be generally aware of the whistleblower provisions potentially available to taxpayers, and of the new potential consequences of a change in worker classification. Worker classification affects employer liability for the ESRP, and access to employer-sponsored insurance for employees impacts PTC eligibility. It also affects whether a worker is protected from retaliation under ACA Section 1558. It seems likely that most questions and problems about retaliation will revolve around workers receiving subsidies through an exchange. However, LITCs must also be aware of the broader health insurance and shared responsibility issues when advising a taxpayer, particularly if there is a potential worker classification issue.

Conclusion

The implementation of the ACA has come a long way in the last two years, but there is much that is still unknown. LITCs will be better prepared for controversy referrals and technical assistance inquiries if we are aware of the issues facing health care enrollment assisters. LITCs can provide crucial insight into the tax system for health care attorneys and assisters. LITCs can also be strong advocates for low-income taxpayers as IRS personnel and taxpayers alike are figuring out the law and the appropriate procedures.

List of Forms, Letters, and Acronyms

Acronyms

ACA: Patient Protection and Affordable Care Act, aka Affordable Care Act

ALE: Applicable Large Employer

APTC: advance payments of the Premium Tax Credit

CSR: cost-sharing reduction

ESRP: employer shared responsibility payment

LITC: Low Income Taxpayer Clinic

MEC: minimum essential coverage

QHP: qualified health plan

PTC: Premium Tax Credit

IRS Forms

[1095-A](#), Health Insurance Marketplace Statement.

[1095-B](#), Health Coverage. Filed by government agencies and health insurance companies to document MEC.

[1095-C](#), Employer-Provided Health Insurance Offer and Coverage. Filed by ALEs.

[Form 8962](#), Premium Tax Credit. Used to claim a PTC and reconcile APTC received during the tax year.

IRS Letters

Letter 12C, Individual Return Incomplete for Processing. This letter requests additional information or tax forms needed to process an individual income tax return.

Letters [5591](#), [5591A](#), [5596](#). This letter, in three variations, was sent around July 2015 to taxpayers who had failed to reconcile 2014 APTC by that date. The letter urges the recipient to file a 2014 tax return with Form 8962 as soon as possible.

Christine Speidel is a staff attorney at Vermont Legal Aid. She directs Vermont Legal Aid's Low Income Taxpayer Project, which advises and represents low-income individuals residing in Vermont. If you have any [questions](#) or comments, please contact Christine at cspeidel@vtlegalaid.org.

OTHER ITEMS OF INTEREST

Carlton Smith, *New, Additional Proposed Innocent Spouse Regulations Issued:*

<http://www.procedurallytaxing.com/new-additional-proposed-innocent-spouse-regulations-issued-part-1/>

<http://www.procedurallytaxing.com/new-additional-proposed-innocent-spouse-regulations-issued-part-2/>

National Tax Association, 108th Annual Conference on Taxation, final program:

http://www.ntanet.org/images/stories/pdf/nta_finalannualconference_program_2015_web_03.pdf

Infanti, *The Tax Perils Of Obergefell And Windsor*:

http://taxprof.typepad.com/taxprof_blog/2015/11/infanti-the-tax-perils-of-obergefell-and-windsor.html

2015 Low Income Taxpayers Representation Workshop, Dec. 7th, Washington, DC

<http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=225945782>

National Health Law Program, *The Advocate's Guide to MAGI*:

<http://www.healthlaw.org/publications/search-publications/agmagi#>

Nicholas Xanthopoulos, *The Right to Be Informed: Using the Freedom of Information Act and Internal Revenue Manual to Secure Taxpayer Records*: <http://www.procedurallytaxing.com/the-right-to-be-informed-using-the-freedom-of-information-act-and-internal-revenue-manual-to-secure-taxpayer-records/>,

Memo from IRS excluding Social Security from FPLP:

<https://www.irs.gov/pub/foia/ig/spder/SBSE-05-1015-0067.pdf>

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